



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

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May 19, 2021

Via Electronic Mail

Shonda D. Green
Department Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 600
Boston, Massachusetts 02118

RE: Petition to Remove Surety Bond Requirements for Utility License Agreement
Municipalities, D.T.C. 20-4

Dear Secretary Green:

On November 1, 2020, the Town of Shutesbury ("Town") filed a petition with the Department of Telecommunications and Cable ("DTC") to request that the DTC remove the surety bond requirements included in the terms and conditions of pole attachment agreements ("Agreements") the Town executed with Verizon New England, Inc. ("Verizon"); Massachusetts Electric Company doing business as National Grid ("National Grid"); and Western Massachusetts Electric Company, doing business as Eversource Energy

(“Eversource”) (collectively “the Companies”) in 2017 and 2018 to build a municipal broadband network.¹ The DTC docketed this matter as D.T.C. 20-4.

The Department of Public Utilities (“DPU”) is a full-party intervenor in this matter pursuant to ¶ 9 of the Memorandum of Agreement (“MOA”) executed on October 14, 2008, and subsequently renewed on February 3, 2017, between the DPU and the DTC.² The DPU provides the following comments for the DTC’s consideration.³

I. FACTUAL AND LEGAL BACKGROUND

Pursuant to G.L. c. 166, § 25A (“Section 25A”), the Companies must provide nondiscriminatory access to their utility poles to any person, firm or corporation other than a utility, which provides telecommunications service. Section 25A authorizes the DPU and the DTC to regulate the rates, terms and conditions applicable to attachments and “to determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree.” G.L. c. 166, § 25A. In so doing, the DPU and the DTC must “consider the interest of subscribers of cable television services and wireless

¹ On December 1, 2020, the Town refiled its petition to attach copies of the pole attachment agreements executed by the Town and the Companies.

² Although the DPU is a full-party intervenor in this matter, we note that, pursuant to ¶ 6 of the MOA, to the extent that changes are contemplated to the regulations, policies, or procedures applicable to pole attachments, such changes are to be jointly developed and promulgated by the DPU and the DTC.

³ The DPU’s comments are not intended to respond to every argument made or position by the Town or the Companies. Rather, the DPU’s comments are intended to respond only to the extent necessary to assist the DTC in its deliberation. Silence by the DPU with respect to any issue addressed by the Town or the Companies cannot be construed as assent to their position.

telecommunications services as well as the interest of consumers of utility services.”

G.L. c. 166, § 25A.

The Town’s fiber cable system for high-speed internet and phone service covers 42 miles of public roadways and is attached to approximately 1500 utility poles jointly owned by Verizon and either National Grid or Eversource (Town’s Petition at 1). As of June 30, 2019, 763 households subscribed to the broadband network, representing 87 percent of households in the Town.⁴ To subscribe, the Town’s residents must contribute to installation costs, pay an activation fee to begin service, and also pay a monthly subscription fee of \$75 for internet or phone or \$88 for internet and phone.⁵

Each of the Companies’ Agreements with the Town include a requirement that the Town furnish a surety bond or other satisfactory evidence of financial security to guarantee the Town’s obligations, including removal of the attachments in the case of a default (Town’s Petition at 1-2). The Agreement with National Grid requires the financial security to be in such form and amount as determined by National Grid (National Grid Agreement, § 3.3). The Verizon and Eversource Agreements each require a surety bond or irrevocable letter of credit according to the number of attachments (e.g., for between 501 and 2000 poles a security in the amount of \$300,000 is required) (Verizon Agreement, § 12.1; Eversource Agreement, § 12.1).

⁴ Shutesbury Broadband Committee Annual Town Report, Fiscal Year 2018, available at <https://www.shutesbury.org/sites/default/files/files-and-images/Broadband/SBBC%20Annual%20July%202018-June%202019.pdf> (last visited May 19, 2021).

⁵ Broadband Committee/Municipal Light Plant (MLP) Board, Shutesbury, <https://www.shutesbury.org/broadband> (last visited May 19, 2021).

The Town states that it pays \$6,750 per year to maintain the surety bonds required by the Companies (Town's Petition at 1; Town's Response at 5). The Town maintains that the cost to remove its fiber cable network would be \$315,000 (Town's Response at 5).

II. POSITIONS OF THE PARTIES

A. The Town

The Town asserts that the surety bond requirement is necessary and reasonable for private communications companies, such as CATV corporations; however, the Town maintains that the surety bond requirement is unnecessary and unreasonable for municipalities because of several distinctions between municipalities and typical communications companies (Town Petition at 2). The Town contends that the following factors distinguish municipalities from communications companies: (1) utility pole owners reserve space for one crossarm on every pole for municipal fire and police signal systems; (2) there is a spirit of mutual benefit involved in the relationship between municipalities and utility companies; (3) municipalities are more financially stable entities than entities such as CATV corporations; and (4) if a municipality declared bankruptcy the state would ensure the municipality met all contractual obligations, essential services would continue, and taxes would be levied to meet the municipality's obligations. Additionally, the Town asserts that it is unlikely the Companies would have to exercise their rights against the Town's surety bonds because (1) the fiber cable system is a valuable asset with long-term value that could be sold rather than removed and (2) the infrastructure includes a steel support cable that adds significant stability and strength to the utility pole system that would not be removed if the Town's broadband network was abandoned.

B. The Companies

1. Verizon

Verizon contends that the surety bond requirement is a common, standard, and reasonable means of protecting the network and Verizon from the risk of loss arising when a

licensee attaches its facilities to Verizon's poles (Verizon Response at 1, 9-10). Verizon asserts that the risk includes the costs Verizon may incur if the licensee fails to pay annual attachment fees, relocate its facilities on the poles, or remove its facilities upon termination and the extraordinary time and expenses Verizon would incur to recover those costs through negotiation, litigation, or special proceedings (Verizon Response at 1, 8). Verizon argues that the surety bond requirement offers a just and reasonable means of protecting the pole owner without imposing more costly requirements on the licensee, such as the requirement to provide a deposit (Verizon Response at 2).

2. National Grid

National Grid maintains that the surety bond requirement is an important and crucial component of the pole attachment agreement for any entity that wishes to attach to a pole (National Grid Response at 1). National Grid asserts that allowing the Town's petition would expose National Grid to potential costs due to substandard work, failure to pay, or other contractual breaches on behalf of municipal pole attachers (National Grid Response at 2). National Grid claims that its customers would ultimately pay for such costs, which would violate the cost-causation principle that pole attaching entities should pay for the incremental costs associated with pole work (National Grid Response at 2). National Grid states that it has approximately 36 municipalities with pole attachments and contends that if the surety bond provision were removed for municipal pole attachers, National Grid would be exposed to a higher level of risk to bear incidental costs whenever a municipality attaches to a pole (National Grid Response at 2 & n.1)

3. Eversource

Eversource states that it requires a surety bond of pole attaching entities to ensure recovery of various costs after the attachment is made, such as repair costs, the cost of removal, and annual licensing fees (Eversource Response at 1). Eversource maintains that municipalities are not always or inherently more stable than all telecommunications providers

and that if a municipality did experience severe financial troubles there is no legal guarantee that the municipality would honor all its contractual obligations to the licensors (Eversource Response at 2). Eversource asserts that even if it is unlikely for a municipality to fail in fulfilling its contractual obligations, a surety bond ensures that any cost arising from such an unlikely event is borne by the pole attacher rather than the pole owner and its customers (Eversource Response at 2).

III. REASONABLENESS OF THE SURETY BOND REQUIREMENT

As discussed above, the determination of whether the surety bond requirement is reasonable must include consideration of the interests of the Town's phone and internet subscribers and the interests of the utility companies' customers. Additionally, uniform precedent governing pole attachments is consistent with the provision of nondiscriminatory access to poles for telecommunication services and promotes fairness and administrative efficiency.

The DPU acknowledges the value and importance of reliable telecommunications services and the difficulties municipalities face providing such services where they are not commercially available. For a small town, an annual expense in the amount of \$6,750 is not insignificant. However, as a component of the Town's cost of service, the bill impact of the surety bond requirement is approximately \$0.74 per month.⁶ Accordingly, the surety bond requirement does not have a significant impact on the Town's rates.

With respect to the Companies' customers, given the size of the Town and the number of poles involved, the risk of not requiring a surety bond is relatively low. Nonetheless, allowing the Town's petition will set a precedent which, if granted in other contexts with

⁶ \$6,750 divided by 763 customers and divided by 12 months equals \$0.74 (rounded to the nearest cent).

larger municipalities, would pose a higher risk to utility ratepayers in the case that the municipality defaults.

The DPU believes that there is some risk that the Companies would need to exercise their rights against the Town's surety bond. The assessment of that risk and the requirement of a surety bond for licensees are business decisions that should be left to the licensors. Accordingly, the DPU believes that, generally speaking, the surety bond requirement is not unreasonable. However, the DTC should assess whether the surety bond the Town is required to hold under the Agreements is excessive.⁷

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin T. Crane". The signature is fluid and cursive, with the first name "Kevin" and last name "Crane" clearly distinguishable.

Kevin T. Crane, Esq.
Department of Public Utilities

cc: D.T.C. 20-4 Service List

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The DPU notes that the Town provided the total amount of the surety bonds and an estimate of the cost to remove its facilities from the poles for the first time in its response to the Companies' responses. As such, the Companies have not had an opportunity to respond to the cost of removal estimate provided by the Town.